Supreme Court, U.S.
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No. 96-1943

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRED STALLWORTH, PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the district court's dismissal of petitioner's complaint as time-barred, even though the agency earlier had chosen to investigate petitioner's claim administratively.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Bowden v. *United States*, 106 F.3d 433 (D.C. Cir. 1997)	6
Boyd v. *United States Postal Serv.*, 752 F.2d 410 (9th Cir. 1985)	4, 8
Briones v. *Runyon*, 101 F.3d 287 (2d Cir. 1996)	5
Brown v. *General Services Admin.*, 425 U.S. 820 (1976)	3
Brown v. *Marsh*, 777 F.2d 8 (D.C. Cir. 1985)	7
Davis v. *United States*, 417 U.S. 333 (1974)	6
Girard v. *Rubin*, 62 F.3d 1244 (9th Cir. 1995)	5
Henderson v. *United States Veterans Admin.*, 790 F.2d 436 (5th Cir.1986)	7
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	3
Oaxaca v. *Roscoe*, 641 F.2d 386 (5th Cir. 1981)	4
Rowe v. *Sullivan*, 967 F.2d 186 (5th Cir. 1992)	4, 5
Saltz v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982)	4
Shea v. *Tisch*, 870 F.2d 786 (1st Cir. 1989)	5
Wilson v. *Peña*, 79 F.3d 154 (D.C. Cir. 1996)	5

Statutes and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-2(a)	2
29 C.F.R. 1613.214(a)(1)(i) (1980)	7

Regulations—Continued: Page

29 C.F.R. (1995):
Section 1613.214(a)(1)(i) 3
Section 1613.215(a)(4) 6
29 C.F.R. (1996):
Section 1614.105(a)(1) 3
Section 1614.408 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 107 F.3d 923 (Table). The opinion of the district court (Pet. App. 8a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 7, 1997. A petition for rehearing was denied on March 10, 1997. Pet. App. 6a. The petition for a writ of certiorari was filed on June 6, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Fred Stallworth is a program analyst with the United States Department of Labor (Department). Pet. App. 2a. He alleges that the Department discriminated against him on the basis of his race, color, sex, and age, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), when it denied him per diem reimbursement for work performed in Florida. Pet. App. 2a-3a, 12a; Pet. 4. Petitioner contended that his October 27, 1987, transfer agreement with the Department had originally provided for per diem benefits, but "that the Department unilaterally inserted new terms into the * * * agreement after he signed it." *Id.* at 2a. Petitioner exchanged correspondence with the Department about this matter through mid-1989. *Ibid.*

In a letter dated September 9, 1988, the Department informed petitioner that the payment of per diem reimbursement "is not obligatory," and that the October 27, 1987, agreement set forth the only expenses for which petitioner would be reimbursed. Pet. App. 2a-3a. Petitioner claimed, however, that he was not aware that the agency was denying him the per diem benefits until he met with an agency representative nearly a year later, on July 28, 1989. *Id.* at 3a. On August 16, 1989, petitioner met with an Equal Employment Opportunity (EEO) counselor and filed an informal administrative complaint alleging discrimination. *Ibid.*

2. a. At the time petitioner's claim arose, Equal Employment Opportunity Commission regulations

required persons alleging discrimination to contact the agency's EEO counselor within 30 days of

> the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

29 C.F.R. 1613.214(a)(1)(i) (1995).[1] Failure to meet this time limit renders a complaint untimely and bars the individual from filing a Title VII action in district court. See *Brown* v. *General Services Admin.*, 425 U.S. 820, 832-833 (1976). The time limit operates like a statute of limitations, however, and is thus subject to waiver. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

b. In March 1992, the Department determined that it had not discriminated against petitioner when it rejected his claim for per diem reimbursement. Pet. App. 9a-11a; see also *id.* at 12a-17a. The Department did not address the timeliness of petitioner's complaint. See *ibid.*

Petitioner subsequently filed suit in the United States District Court for the District of Columbia. The district court dismissed petitioner's complaint, holding that his claims were untimely and that he had failed to exhaust his administrative remedies. See Pet. App. 2a, 8a.

3. The court of appeals affirmed, holding that petitioner's complaint was untimely because he failed

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[1] The current regulation provides that "[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1) (1996).

to contact the Department's EEO counselor within 30 days. Pet. App. 3a-4a. The court also ruled that the Department's administrative investigation of petitioner's complaint did not waive the defense of untimeliness. *Id.* at 4a ("[T]he fact that the Department chose to investigate the problem itself in 1988 and 1989 does not preclude it from raising the timeliness defense here."). The court of appeals emphasized that "[t]he Department did not delay in raising the defense before the district court, and [petitioner] has not been prejudiced by the agency's decision to investigate the merits of his complaint." *Ibid.*

DISCUSSION

Petitioner contends (Pet. 7-15) that the court of appeals erred in holding that the Department's administrative consideration of his complaint did not waive its right to assert a timeliness defense before the district court. Because the court of appeals' unpublished decision is correct and consistent with the rulings of other courts, this argument does not merit further review.

1. The courts of appeals that have addressed the question have consistently held that "[t]he mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit when the later investigation does not result in an administrative finding of discrimination." *Boyd* v. *United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985); see also *Rowe* v. *Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992); *Saltz* v. *Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982); *Oaxaca* v. *Roscoe*, 641 F.2d 386, 390 & n.2 (5th Cir. 1981).

Petitioner suggests (Pet. 12-13) that the courts of appeals are in conflict over whether an agency's finding of timeliness must be express to effect a waiver of the defense, or whether a waiver can be implied from the agency's processing of the complaint. No such conflict exists. The courts agree that, "[i]n order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely." *Rowe*, 967 F.2d at 191; see also *Shea* v. *Tisch*, 870 F.2d 786, 788 (1st Cir. 1989) (per curiam) (where agency expressly found that filing was timely, it waived timeliness defense).

Petitioner espies an emerging conflict between where "the District of Columbia Circuit is moving" (Pet. 12) and the decisions of other circuits "not directly addressing the precise issue raised here" (Pet. 13). This is an insufficient basis for review. The court of appeals' disposition of petitioner's appeal is the best evidence of where the D.C. Circuit "is moving" and, as noted, that decision is consistent with the requirement of an express finding of timeliness to effect a waiver.

Petitioner's citation (Pet. 12) to *Wilson* v. *Peña*, 79 F.3d 154 (D.C. Cir. 1996), is inapt. That case addressed whether a party's failure to provide adequate documentation to an agency constitutes a failure to exhaust administrative remedies. *Id.* at 164-165. The decisions of the Ninth and Second Circuits in *Girard* v. *Rubin*, 62 F.3d 1244 (9th Cir. 1995), and *Briones* v. *Runyon*, 101 F.3d 287 (2d Cir. 1996), which petitioner also cites (Pet. 13), address waiver in the unique situation where the Equal Employment Opportunity Commission and the agency made two express and contradictory findings on timeliness. *Briones*, 101 F.3d at 290-291 (EEOC's express finding of

timeliness trumps agency's express finding of untimeliness and thereby precludes timeliness defense); *Girard*, 62 F.3d at 1247 (same). Both *Girard* and *Briones* reconfirm, moreover, that an express finding of timeliness (which did not occur in the instant case) will waive the timeliness defense.

Petitioner argues that the court of appeals' decision conflicts with its recent opinion in *Bowden* v. *United States*, 106 F.3d 433 (D.C. Cir. 1997). Pet. 6-7, 12, 15. *Bowden* is clearly distinguishable. In *Bowden*, the agency waived its timeliness defense because, "[n]ot only did the [agency] fail to question [plaintiff's] timeliness during the administrative process, but it did not raise the issue either in response to [plaintiff's] initial suit in district court or later when [plaintiff] took his case to the Court of Claims." 106 F.3d at 439. The court also emphasized that "the government's plainly contradictory responses" to plaintiff's complaints in the district court and the Claims Court "prolonged [plaintiff's] quest for resolution of his complaint by three years." *Ibid.*[2] The *Bowden* court, moreover, carefully eschewed the creation of a "sweeping principle concerning waiver of administrative time limits under Title VII." *Ibid.* In any event, even if tension existed between the two D.C. Circuit opinions, an intra-circuit conflict would not warrant this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

2. Petitioner also contends (Pet. 7-9, 13-14) that a 1987 amendment of 29 C.F.R. 1613.215(a)(4), requires

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[2] Indeed, by noting (Pet. 7 n.2) that "*Bowden* also presented the issue of government conduct constituting waiver once the lawsuit was filed," petitioner acknowledges one of the crucial differences between the present case and *Bowden*.

agencies to reject untimely complaints and that a failure to do so waives the timeliness defense. This argument is without merit. First, petitioner errs in asserting (Pet. 7-8) that the mandatory language in the 1987 amendment worked a major diminution in agency authority to entertain untimely claims. See 29 C.F.R. 1613.214(a)(1)(i) (1980) ("agency may accept the complaint for processing in accordance with this subpart *only if*" the complainant had contacted an EEO counselor within the 30-day limit) (emphasis added).

Second, nothing in either version of the regulation's language addresses the issue presented in this case: whether an agency's failure to dismiss an untimely claim at the administrative level precludes application of the time limit in a separate judicial proceeding. Courts have concluded, though, that petitioner's proposed interpretation of the regulation would "discourage administrative resolution of meritorious claims, which nevertheless are untimely." *Henderson* v. *United States Veterans Admin.*, 790 F.2d 436, 441 (5th Cir. 1986); see also *Brown* v. *Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985) (court is "loath to hold that mere investigation without more constitutes a binding waiver of any agency's right to raise the timeliness issue," because such a holding would discourage agencies from voluntarily investigating and resolving problems of discrimination).[3]

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[3] In any event, petitioner is ill-positioned to complain (Pet. 8-9) about a perceived lack of adherence to a timeliness rule that was in fact ultimately enforced in his case and that, if enforced by the agency as he wishes, would simply have extinguished his complaint sooner.

3. Finally, petitioner asserts (Pet. 10-12) that this Court should grant a writ of certiorari to reduce the burden of employment civil rights cases on federal courts. Petitioner's statistical speculation presents no proper basis for this Court's exercise of its certiorari jurisdiction.

Moreover, petitioner's proposal that agencies be held to have waived a timeliness defense to judicial proceedings by considering an administrative complaint on the merits may well increase, rather than reduce, court litigation. When an agency accepts an untimely complaint and makes a finding of discrimination, it cannot appeal its own decision to the district court. *E.g.*, *Boyd*, 752 F.2d at 413-414. Thus, when agencies investigate first and find discrimination, the dispute is generally resolved at the administrative level. On the other hand, if an agency rejects an administrative complaint on timeliness grounds, the claimant may challenge the agency's determination in district court. 29 C.F.R. 1614.408 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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